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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 467 Misc.

4278 HAZEL BUILDING CORPORATION, A CORPORATION, L. L. VANDERVOORT, AND HAZEL-CREST HOTEL CORPORATION, A CORPORATION,

Petitioners,

vs.

ALBERT BEREST, KATHERINE M. BOGDAN, MAUD A. SULLIVAN, NITTA BEALES, J. W. DOWNS AND B. McTAGGART, FLORENCE B. ANDREWS, RUTH A. JUBB, FLORENCE M. RADCLIFFE, DR. EDWARD SAGER, KATHERINE E. STIMSON, KENNETH ANDERSON, R. M. SCALLON, EUGENIA T. AND FRANCES SCHIERSTEIN, SIMON S. FROLICH, EDWARD KRAUSS, JOSEPH G. BEZARK, MAX SINZHEIMER, ROSELLA PEARSON, OLIVE MARSHALL, DAVID J. DAVIS, E. J. RYAN, L. J. CALDWELL, JOHN VAUDREUIL, MINERVA L. HERRMANN AND LORETTA L. HERMANN,

Respondents.

REPLY BRIEF OF PETITIONERS.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI UNDER SECTION 1651 OF THE JUDICIARY ACT AND TO CONSOLIDATE THIS CAUSE WITH CASE NO. 742.

MEYER ABRAMS,
WILLIAM HENNING RUBIN,
Attorneys for Petitioners.

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134 North La Salle Street,
Chicago, Illinois,
Of Counsel.

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PETITIONERS' REPLY.

STATEMENT.

We have filed simultaneously with the petition in the instant case, another petition for the issuance of a Writ of Certiorari before judgment to the Court of Appeals for the Seventh Circuit involving the *identical* issues (Case No. 742). The respondents in that case *conceded* in their answer the importance of the question, the conflict

in the decisions, and admitted that this was a proper case for the issuance of the discretionary Writ by this court. The only difference between this case and the other is that this petition is sought to be filed under § 1651 (28 U. S. C. A. § 1651) while the other petition was filed under §§ 1254 and 2101 (28 U. S. C. A. §§ 1254 and 2101). If this court will grant the Writ in case No. 742, we suggest that upon the allowance of the motion for leave to file this petition, that the two cases be consolidated for hearing.

Respondents *concede* (p. 4) that this court has the jurisdiction and "power" to issue the Writ and that (p. 15) "There exists a conflict in the decisions between the Seventh and Third Circuits as to the construction of § 205 of the Housing and Rent Act". They only oppose the granting of the writ at this stage, and insist that we must go through the *formality* of trial, an appeal, and then apply here for the Writ. They contend that the fact that the Seventh Circuit decided that question in another appeal (*Adler* v. *Northern Hotel Co.*, 175 F. (2d) 619) does not follow that it may not change its ruling upon the prosecution of another appeal. They, themselves, *cite* on another point (p. 5) the decision of *Meyercheck* v. *Givens*, 180 F. (2) 221 where the Seventh Circuit *foreclosed* a reargument on the jurisdictional question when it referred to its previous decision in the *Adler* case in which there was a strong dissenting opinion by Mr. Justice Minton, and in referring to that dissenting opinion and in *adhering* to its views the court said (pp. 222-3):

> "while there may be room for argument as to the validity of our holding in that case, we are not convinced that it is erroneous and we adhere to it."

This was the *unanimous* opinion of the Seventh Circuit on the subsequent appeal in another case. This court, will, therefore, not require petitioners to go through the formality of useless acts as we have done in Case No. 742.

I.

While the Impropriety of the Joinder of Parties and Causes May in Itself Not be Ground for the Issuance of the Extraordinary Writ Before Judgment, This Question May be Incidentally Decided Upon the Issuance of the Writ to Review the Jurisdictional Question Under the Extraordinary Circumstances.

The contention that the Extraordinary Writ of Certiorari should not be invoked to determine the question of the propriety of the joinder of the parties and subject matter, is without merit, as the grounds for the issuance of the writ is the conflict in the decisions on the jurisdictional question, and if the extraordinary writ is issued the incidental question may be determined in the discretion of this court.

II.

The Conflict in the Decisions of the Third, Fifth and Seventh Circuits and the Doubt Expressed by the Tenth Circuit, as Well as the Confusion Which Prevails in the Respective District Courts is Sufficient Reason for the Issuance of the Writ.

Respondents urge four reasons for the denial of the writ, none of which are meritorious.

1. The Interlocutory Order May Not Be Reviewed by the Circuit Court of Appeals.

The contention (p. 7) that the interlocutory order may be reviewed by a writ of certiorari issued by the Court of Appeals under § 1651 is clearly without any basis. At any rate, an application to it to issue the *discretionary writ* would be *futile,* as the question was decided by it in

the first instance (*Adler* v. *Northern Hotel Co.*, 175 F. (2) 619), and it adhered to its former decision in a later appeal (*Meyercheck* v. *Givens*, 180 F. (2) 221). The argument (p. 8) that "there is no justification in this case for circumventing the Court of Appeals," and the statement that "petitioners may not assume that recourse to it will therefore be futile" is overcome by the opinion of that Court in *Meyercheck* v. *Givens, supra.*

2. The Fact That the Trial Court's Ruling on the Motion Did Not Constitute an Extra-Judicial Act Is No Reason for the Denial of the Writ Under the Extraordinary Circumstances in This Case.

It is true as counsel say (p. 9) that this court will not issue extraordinary writs as a substitute for appeal where the matters are reviewable in the "regular" course of appeal. Petitioners are in no position to appeal from the interlocutory order. If the Court of Appeals had left room for argument, Petitioners might be required to submit to trial and prosecute an appeal, and later seek a review here. The situation here is completely different. *The Court of Appeals has closed the door to review the jurisdictional question* in the two decisions cited above. Its views are in *conflict* with the views of the other Court of Appeals. This court will not require Petitioners to go through a tedious and costly trial in order to go through a *formality* to prosecute a useless appeal and to seek a review here.

Petitioners will be compelled to go through a lengthy trial with twenty-five plaintiffs on the question whether the Hotel was decontrolled. The question whether the Hotel is known in the community as a "hotel" and whether the Hotel furnished the required service to each of the twenty-five plaintiffs would consume a great deal of time and expense, and if it should be decided later that there was an absence of jurisdiction, the whole matter would

become wasted labor, expense and efforts. In the other case (175 F. (2) 619), the parties were compelled to go through a lengthy trial and to prosecute an appeal. After the determination of the jurisdictional question by the Court of Appeals, the case was remanded for a new trial (*Adler* v. *Northern Hotel Co.*, 180 F. (2) 742). The parties will now be compelled to go through another lengthy trial pursuant to the remanding order, and thereafter prosecute another appeal and later seek a review here on the jurisdictional question and should this court decide against the jurisdiction all the work and expense would be for naught. It is *to avoid such an unreasonable result and the great hardship upon the parties, as well as upon the courts* that this Petition is filed to obtain a decision from this court on the jurisdictional question on which the courts are not in accord.

In order to avoid the technicality that we did not file a Petition to review the case while pending in the Court of Appeals, we went through the formality in the other case (No. 742), stood by the motion to dismiss, suffered the entry of a default judgment, prosecuted an appeal to the court of appeals and then filed the Petition here pursuant to Sections 1254 and 2101 of the Judiciary Act of 1948. We did not do this futile act in the instant case, as we considered that if this court will grant the petition in the other case it will also grant the writ in this case which involves the identical questions.

3. The Issuance of the Writ Is Not Based on Irreparable Injuries But on Great Hardship and Unusual Circumstances.

No irreparable injury is relied on for the request of the issuance of the writ under § 1651 to which counsel devote their brief in opposition thereto (p. 10). The test for the issuance of the writ in the two cases where the writs were issued under former § 262 which is now replaced

by § 1651 (*United States Alkalai Exp. Ass.* v. *U. S.*, 325 U. S. 14; *De Beers Mines* v. *U. S.*, 325 U. S. 212) was *not* based on irreparable injury but on "hardship imposed" coupled with *unusual circumstances* concerning a jurisdictional question.

In the *Roche* case (319 U. S. 21) which counsel cite (p. 5) the writ was denied on the ground that "inconvenience" of trial was not contemplated by Congress when it allowed the review from "final" judgments only. The Judiciary Act of 1948 has *liberalized* review by certiorari and provided in the Act (T. 28, § 1254 (1)) that a review by certiorari is permissible *before* judgment. This was followed by another section of the act (T. 28, § 2101 (d)) which provides that where the review is sought from an interlocutory order *before* judgment, the writ may be issued regardless of the time when the order was entered. These two sections are to be read together with the section under which the instant petition is sought to be filed (T. 28, § 1651).

4. The Question Is of Sufficient Public Importance to Be Decided by This Court.

Respondents here claim that the question is not of sufficient public importance for the issuance of the writ. The *opposite view* was taken by the respondents in case No. 742.

The statement of counsel (p. 15) that "there has been no decisions" other than the *Field* and *Adler* cases is refuted by their *own citation* on another point of the decision in *Meyercheck* v. *Givens*, 180 F. (2) 221. The point was also discussed in a decision rendered by the 10th Circuit which mentioned the conflicting views but took no position in the matter as it distinguished that case from the other two cases (*Greiber* v. *Woods*, 177 F. (2) 1016, 1017).

The conflicting views of the 7th Circuit as expressed in *Adler* v. *Northern Hotel Co.*, 175 F. (2) 619, and *Meyercheck* v. *Givens*, 180 F. (2) 221, with the views of the 3rd Circuit in *Fields* v. *Washington*, 173 F. (2) 701; *Koster* v. *Turchi*, 173 F. (2) 608, followed by the 5th Circuit in *Steinfeld* v. *Hayman*, 175 F. (2) 68, and the confusion in the decisions of the various district courts as cited in our brief (pp. 13-14) and in the cases which came to our attention since the filing of the petition (*Morein* v. *Hausman*, 85 F. Supp. 57; *Ramseyer* v. *Constable*, 86 F. Supp. 104; *Frisch* v. *Lopez*, 87 F. Supp. 544), call for the exercise of the discretionary power of this court to allow the filing of this petition and to grant the writ.

Conclusion.

In view of the foregoing, we suggest to the court that leave be granted to file the instant petition and to consolidate it with Case No. 742 and that the writ be issued so that the important Federal question on which the various courts are not in accord may be finally settled.

Respectfully submitted,

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